

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GEORGE ANTONIO JOHNSON,

Defendant-Appellant.

UNPUBLISHED

May 22, 2007

No. 267293

Wayne Circuit Court

LC No. 05-003838-01

Before: White, P.J., and Saad and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions on two counts of armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to 13 to 25 years in prison for the two armed robbery convictions, one to five years in prison for the felon in possession of a firearm conviction, and two years in prison on felony-firearm conviction. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, defendant argues that the evidence presented during the bench trial was insufficient to identify him as the person who committed the crimes charged. We disagree. When considering a claim of insufficient evidence, this Court reviews the record de novo. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). This Court reviews the evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). We review the trial court's findings of fact under the clearly erroneous standard.

Defendant argues that the prosecution's evidence was insufficient for a reasonable trier of fact to conclude that defendant committed the crimes charged. He argues that because eyewitness testimony in general is unreliable, it is not conclusive that both victims selected defendant from a photographic line up, and the in-court identifications have little independent significance. He also suggests that the line up was problematic because no attorney was present. In addition, he argues that inconsistencies between the victims' statements at trial and their earlier statements to police and at the preliminary examination cast doubt on the reliability of their identification of defendant. We disagree.

The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant was armed with a weapon described in the statute. *People v Ford*, 262 Mich App 443, 458; 687 NW2d 119 (2004); MCL 750.529. The elements of felon in possession of a firearm are: (1) the defendant possessed a firearm, (2) the defendant was convicted of a specified felony, and (3) less than five years have passed since the defendant successfully completed probation or parole, completed a term of imprisonment, and paid all fines with regard to the underlying felony. See *People v Parker*, 230 Mich App 677, 684-686; 584 NW2d 753 (1998); MCL 750.224f. The elements of felony-firearm are: (1) the possession of a firearm, (2) during the commission of, or the attempt to commit, a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999); MCL 750.227b. The identity of the defendant as the perpetrator of a crime is an essential element of every case. *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967). Defendant does not contest the proof of any of the specific elements of the above crimes but argues that the prosecution's evidence was insufficient for a reasonable trier of fact to conclude that defendant committed those crimes. We disagree.

First, defendant had no right to counsel at the photographic line up. In the case of photographic identification, the right to counsel attaches with custody. *People v Kurylczuk*, 443 Mich 289, 302; 505 NW2d 528 (1993). Since defendant was not in custody at the time, the absence of counsel at the photographic line up does not invalidate the victims' identification of defendant.

Moreover, while it is true that the Michigan Supreme Court, *People v Anderson*, 389 Mich 155, 180; 205 NW2d 461 (1973), overruled *People v Hickman*, 470 Mich 602 (2004), and the United States Supreme Court, *United States v Wade*, 388 US 218, 228-232; 87 S Ct 1926; 18 L Ed 2d 1149 (1967), have recognized problems with the reliability of eyewitness testimony, this Court has "decline[d] to read [that] language . . . as a general proscription against the use of such testimony." *People v Davis*, 241 Mich App 697, 705-706; 617 NW2d 381 (2000). Indeed, a positive identification by a witness can be sufficient to support a conviction. *Id.* at 700. In considering challenges based on the general unreliability of eyewitness testimony, this Court has looked to the same factors used to determine whether there is an independent basis for the admissibility of an identification obtained through an impermissibly suggestive procedure. See *id.* at 701-705. These factors include the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the time of confrontation, and the length of time between the crime and the confrontation. *Kurylczuk, supra* at 306.

In this case, a police investigator interviewed the two victims and showed them the photographs separately, only one and a half days after the crime was committed. According to the investigator, each victim selected defendant's photograph in one minute or less, which suggests a high degree of certainty. Both victims had an adequate opportunity to observe their attacker. There were street lights illuminating the parking lot where the incident occurred, the perpetrator's face was not covered, and each victim stood within a few feet of the perpetrator long enough to observe his facial features. The first victim testified that the perpetrator was right in front of her for about five minutes. The second victim also testified that she had an

opportunity to observe the perpetrator for about five minutes and that he was just a few feet from her when she gave him her purse.

The credibility of identification testimony is a question for the trier of fact that this Court does not resolve anew. *Davis, supra* at 700. In this case, the inconsistencies in the victims' testimony would not preclude a rational trier of fact from concluding that defendant committed the crime. Inconsistencies noted by the defendant include such details as whether the perpetrator's car was tan, brown or gold; whether his gun was black or silver; and whether his jacket was light brown, dark brown, or black. Defendant also points out that while one of the victims testified at trial that defendant touched her shoulder, grabbed her phone, and pulled the lip gloss out of her pocket, she did not mention these things to the investigator at the police station on February 1, 2005. As the trial court observed, these inconsistencies are minor when viewed in light of the overall consistency of the testimony. We conclude that the evidence was sufficient to support defendant's convictions.

Affirmed.

/s/ Helene N. White
/s/ Henry William Saad
/s/ Christopher M. Murray